



Final Regulation Agency Background Document

Agency name	Virginia Pesticide Control Board
Virginia Administrative Code (VAC) citation	2 VAC 20 -40
Regulation title	Regulations Governing Licensing of Pesticide Businesses Operating Under Authority of Virginia Pesticide Control Act
Action title	Amend
Document preparation date	Enter date this form is uploaded on the Town Hall

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The existing regulations establish requirements of pesticide businesses to (i) obtain an annual business license; (ii) keep records; and (iii) provide proof of financial responsibility. In addition, it sets conditions for revocation, suspension, and denial of a pesticide business license.

The proposed amendments (i) define a pesticide business location; (ii) modify the date for a late fee assessment in regards to pesticide business license renewal; (iii) modify the proof of financial responsibility; and (iv) modify record keeping requirements for pesticide businesses.

Statement of agency final action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

At its regularly scheduled quarterly meeting on April 21, 2005, the Pesticide Control Board adopted as a final regulation 2 VAC 20-40-10 through 2 VAC 20-40-110, Regulations

Governing Licensing of Pesticide Businesses Operating Under Authority of Virginia Pesticide Control Act.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Section 3.1-249.30 of the Code of Virginia (1950), as amended, (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-249.30>) provides the discretionary authority for the regulation. Section 3.1-249.30 of the Code of Virginia authorizes the Pesticide Control Board (Board) to promulgate regulations in regards to pesticide businesses as follows: "...the Board may promulgate regulations... including but not limited to the following: 1. Licensing of businesses that manufacture, sell, store, recommend for use, mix or apply pesticides. ... 3. Requiring reporting and record keeping related to licensing and registration. ... 5. Revoking, suspending or denying licenses (business), registration (products), and certification or certificate (applicators or technicians)." In addition, Sections 3.1-249.46 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-249.46>), 3.1-249.49 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-249.49>) and 3.1-249.50 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-249.50>) notes the Board's authority for promulgating pesticide business licensing regulations in support of Section 3.1-249.30.

The Office of the Attorney General has certified the Board has the statutory authority to promulgate the proposed regulation.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the proposed action is to review the regulation for effectiveness and continued need. The regulation establishes standards and procedures in regards to pesticide businesses as defined in Section 3.1-249.27 of the Virginia Pesticide Control Act.

The need for the regulation is to (i) protect the public's health, safety and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth; (ii) establish standards for the licensure of pesticide businesses (and for the denial, suspension, or revocation

of the license); and (iii) establish record keeping requirements for licensed pesticide businesses, as a means of ensuring that pesticides are stored and used safely.

The regulation is necessary to protect the health, safety and welfare of citizens because it ensures that all businesses applying pesticides for compensation employ an individual who is knowledgeable of (i) pesticide laws and regulations, (ii) potential hazards of pesticides to man and the environment and (iii) the safe distribution, use and disposal of pesticides. In addition, the regulation requires that pesticide businesses (i) maintain a minimum amount of liability insurance and (ii) keep and maintain records of the sale of restricted use pesticides and the application of all (restricted and non-restricted use) pesticides to protect the citizens of the Commonwealth from any pesticide misapplications or accidents.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

Substantive changes to existing sections include:

1. Deletes the definition of bond to be compatible with 1993 amendments to the Pesticide Control Act in §3.1-249.49.
2. Modifies the definition of pest management consultant to include anyone making any pesticide recommendations commercially in Virginia.
3. Defines a pesticide business location to clarify what is a separate outlet or location of a pesticide business.
4. Changes the renewal date of a pesticide business license to be compatible with 1993 amendments to the Pesticide Control Act in §3.1-249.47.
5. Deletes the recordkeeping requirement by commercial applicators for the application of restricted use pesticides.
6. Deletes surety bond and self-insurance as evidence of financial responsibility to be compatible with 1993 amendments to the Pesticide Control Act in §3.1-249.49.

New substantive provisions include:

1. Requires that pesticide businesses keep records of all pesticide applications.

Issues

*Please identify the issues associated with the proposed regulatory action, including:
1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*

- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

Advantages associated with the proposed regulatory action include:

1. The regulation will be easier for the regulated community and the regulators to read and understand.
2. The record keeping requirements for pesticide businesses and commercial applicators will better protect the public’s health, safety and welfare.
3. The regulated community will have a better understanding of what a pesticide business location is and what the required licensure requirements are.
4. The agency will more efficiently and effectively conduct investigations for enforcement of the Pesticide Control Act.
5. The regulation will be compatible with the 1993 amendments to the Pesticide Control Act.

The regulatory action poses no disadvantages to the public or the Commonwealth.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement in proposed regulation	Proposed change in final regulation and rationale
2VAC20-40-80	A minimum of (i) \$200,000 for property damage, subject to a \$1,000 deductible provision in the case of licensees holding liability insurance policies, and \$200,000 for personal injury; or (ii) a combined single limit of \$400,000 with a \$1,000 deductible.	Changes are made to the regulations to ensure that the monetary minimums are compatible with the 1993 amendments to the Pesticide Control Act in §3.1-249.49. This change would reduce the requirements to \$100,000 for property damage, and \$100,000 for personal injury to or death of one person, and \$300,000 per occurrence.

Public comment

Please summarize all comment received during the public comment period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

On August 11, 2005 a comment was received asking the following questions about 2VAC 20-40-40:

1. Does a “pesticide business” include the residence for a crop consultant or salesperson that advises on the use of pesticides, but does not work for an entity that maintains a pesticide business license in the Commonwealth?
2. Would a person that operates as a “farmer-dealer” selling seed products that contain an EPA registered pesticide either genetically or as a seed coating, be considered a “pesticide business”? If so, would all be required to maintain a pesticide business license?
3. Is a “farmer-dealer” that sells and recommends the use of a seed product that contains EPA registered pesticide either genetically or as a treatment, considered a “pesticide management consultant” and what license would that person be required to maintain?
4. Does a pesticide management consultant have to have a commercial applicator license to recommend the use of a general use pesticide?

These questions are triggered by the section of the Business License Regulation which deals with licensing requirements for pest management consultants:

"2VAC20-40-40. Business licensing requirements for pest management consultants.

A. Any person or business which **recommends any pesticide for use commercially in Virginia shall obtain a valid pesticide business license** issued pursuant to 2VAC20-40-20 A of this chapter. This provision shall exclude sales personnel of a licensed pesticide business, company training, technical and sales representatives certified in the demonstration pesticide applicator category, and governmental employees while performing in an official capacity.

B. The specialty categories for a pest management consultant shall conform to the commercial applicator categories established pursuant to the Act. The pest management consultant shall meet the requirements of the specific category or subcategory in which he is making recommendations for pesticide use prior to being issued a business license."

This section of the regulation was created in response to the business license section of the Virginia Pesticide Control Act (VPCA), § 3.1-249.46.B. where it states:

"No person or business may apply or **recommend for use commercially in Virginia any pesticide** without a valid pesticide business license issued pursuant to regulations promulgated by the Board. Such business shall employ a certified commercial applicator who is responsible for (i) the safe application of the pesticides and (ii) providing recommendations for the use of pesticides."

While there is no definition of the word "commercially" in the Act or regulation, the VPCA defines a "pesticide business" as "any person **engaged in the business of:** distributing, applying or recommending the use of a product; or storing, selling, or offering for sale pesticides directly to the user." The first part of this same paragraph is the basis for requiring "for hire" pesticide applicators to have pesticide business licenses. These parties sell their services to other parties. With this in mind, along with the exclusions of sales personnel, etc., the pest management consultant section of the regulation has historically been applied to those who are **selling** their pest management and pesticide recommendations to another party. Pesticide registrant company representatives seeking certification in Virginia are classed as "not for hire," which does not trigger the requirement for a business license.

It is important to note that the "recommendation of pesticides" is only covered under the pesticide business license requirements of the VPCA, not the certification requirements, since recommendation of a pesticide is not covered under the legal definition of "use." Once the circumstances of a "recommendation" trigger the need to have a pesticide business license, the business in turn is required to have a certified commercial applicator to make the recommendations.

The answers to the 4 questions are as follows:

1. Persons working for a pesticide registrant company and only advising people about the products produced by their company, and compensated only by the company they work for, do not need a pesticide business license; if they are compensated by the growers for their recommendations (for-hire) then a business license would be required.
2. Persons selling various seed products that have been treated or seed products that are genetically modified do not need a pesticide business license unless they are treating seeds that belong to someone else and are being compensated for such treatment.
3. The sale of seeds, treated or genetically modified, is not regulated by the VPCA or its attending regulations. Only the action of treating the seed with a pesticide would be regulated under the VPCA. If the seed being treated belonged to someone else and the pesticide applicator was being compensated for the pesticide application, this would constitute a for-hire application, and certification and licensing would be required.
4. Yes, if for hire (being paid by an end user to make recommendations and not just an employee of a pesticide registrant discussing their own pesticide products).

Accordingly, the agency believes that 2VAC 20-40-40 properly addresses the issues raised in the public comments, and that no additional clarification or changes are needed.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
2 VAC 20-40-10			The proposed amendment will delete the definition of bond to be compatible with 1993 amendments to the Pesticide Control Act in §3.1-249.49. A second proposed amendment will modify the definition of pest management consultant to include anyone making recommendations for any commercial pesticide application. The proposed amendment expands the definition from those recommending only restricted use pesticides to also include those recommending general use pesticides as well. This will make the definition compatible with 2 VAC 20-40-40. A third proposed amendment will add the definition of a pesticide business location to clarify what is a separate outlet or location of a pesticide business as outlined in § 3.1-249.46 C. of the Pesticide Control Act. This will reduce confusion in the regulated community as to which locations must be licensed as a pesticide business.
2 VAC 20-40-20			The proposed amendment changes the date for renewal of pesticide business licenses to be compatible with the 1993 amendments to the Pesticide Control Act in §3.1-249.47.
2 VAC 20-40-70		The current regulation requires record keeping by commercial applicators for only restricted use pesticide applications.	The proposed amendments require pesticide businesses to keep records of all pesticide applications. This includes both restricted use and general use pesticides. The proposed amendment will enable the agency to more efficiently and effectively conduct investigations for enforcement of the Pesticide Control Act.
2 VAC 20-40-80			The proposed amendments delete all references to surety bonds and self insurance to be compatible with the 1993 amendments to the Pesticide Control Act

			in §3.1-249.49.
2 VAC 20-40-90			The proposed amendment deletes reference to self insurer to be compatible with 1993 amendments to the Pesticide Control Act in §3.1-249.49.
2 VAC 20-40-120			The proposed amendment deletes this section since the regulation sections it references are no longer in the Virginia Administrative Code.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

Unless otherwise discussed in this report, this regulation has no impact upon families.